Water Governance and Social Justice in São Paulo, Brazil

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ABSTRACT

In the greater metropolitan region of São Paulo, Brazil, close to 20 million people share water resources across multiple uses, from industry to recreation to basic household use. These resources have come under increasing strain due to urban expansion, poor planning, and, more recently, climate change. Conflicts among uses and their underlying principles are increasingly adjudicated in courts, with the Ministério Público (Public Prosecutor's Office) acting as a key advocate for both human rights and environmental protection. As legal interventions become more common in policy questions, how are justice principles shaping emerging approaches to water governance? And how are these types of cases provoking a reconsideration of the role of law in public administration? This paper analyzes the justice ramifications of an increasing use of legal discourses and practices to adjudicate water-related conflicts in São Paulo. It also, and conversely, shows how legal battles over water and sanitation force a shift in the behavior and perspectives of legal actors, and subsequently broaden the meaning of "justice."

KEYWORDS

Environmental Justice; Human Rights; Law and Society; Legal Advocacy; Social Justice; Water

INTRODUCTION

Achieving just, equitable, and sustainable water and sanitation provision can be challenging, despite the best intentions of water managers. Governance of such a complex sector—with its demanding technical and infrastructural requirements, environmental and economic constraints, and social importance—requires concerted efforts at coordination among agencies, consultation with stakeholders, and no small degree of wisdom and foresight. In cities in particular, structural inequality, rapid urbanization, and climate change pose formidable challenges and fuel conflicts among competing uses, some of which end up in court. In adjudicating these conflicts, judges and lawyers are becoming important agents in the construction of "water justice." But as legal interventions become more common in what are, in effect, policy questions, how are legal principles shaping emerging approaches to water governance? Conversely, how are these types of cases provoking a reconsideration of the role of law in public administration?

This paper evaluates the justice principles underlying attempts to adjudicate water-related conflicts through courts. It provides evidence for how concepts of justice bring new "logics" to water governance, opening possibilities for new channels of accountability, subtle shifts in priorities, greater scrutiny of social inequality, and a more thoughtful reckoning with impediments to justice. At the same time, the paper shows how water and sanitation present unique challenges and introduce alternative principles to legal efforts at adjudicating public policy. The fields of law and legal studies—with their tendency to regard rights as "belonging" to individuals and to define disputes, problems, and solutions accordingly—seem ill-equipped to address programmatic, value-laden public administration issues. Water governance challenges courts to consider collective rather than individualistic understandings of rights; systemic remedies, and the concomitant obligations these entail for non-judicial state entities; substantive rather than simply procedural justice; and the indivisibility of political, civil, economic, social, and cultural rights. I argue that processes of legal adjudication and water governance are mutually

constitutive, producing effects with both theoretical and practical importance for the study and promotion of public goods.

The research process comprised the collection of historical and archival data on water and environmental management, water-related court cases, and key informant interviews in São Paulo, Brazil between 2009 and 2012. Court cases and policy documents were chosen based on explicit engagement with human rights (including housing, health, life, and environmental rights), and/or environmental sustainability as they manifest in the water and sanitation sectors. Documents and policies since Constitutional ratification in 1988—a key historical moment from the perspective of law—were collected electronically, through existing in-country archives, and through secondary sources, and were analyzed for principles of justice, human rights, and environmental sustainability. Semi-structured "key informant" interviews lasting approximately 45 minutes were conducted with 40 lawyers, litigants, judges, water and sanitation experts, public administrators, activists, and other knowledgeable people. Interviewees were chosen based on their relationship to and interest in water governance and litigation in the water sector. Purposive sampling was employed to select people with a range of perspectives on water policy and governance. The recruitment process involved contacting respondents directly and through already-established networks of collaborators and interlocutors, as well as using snowball techniques with current respondents to recruit new ones. These "key informant interviews" are valuable tools for understanding relations among institutions and agencies, between institutions and communities, and among individuals within a context, as well as perceptions of—and struggles over—policy (see Evans, 1995).

The analysis that follows highlights the sometimes contradictory policies required to address water sector challenges, and explores how legal actors have attempted to resolve such conflicts—for example between the need for services in irregular communities on the periphery of São Paulo and the need to protect the watershed on which they have settled. It seeks to elucidate the legal and moral

content of water policy adjudication and evaluate the ability of law and courts to promote multiple core principles, including social and ecological justice and human rights. It also explores the emergent character of the legal field in São Paulo from the perspective of legal actors immersed in applying shifting conceptions of justice to urban water and sanitation challenges. It also highlights the drawbacks of an overreliance on legal mechanisms for addressing shortcomings in water policy. This work forms part of a larger research program examining water, sanitation, human rights, and sustainability in rapidly growing urban areas.

JUSTICE THEORY AND THE FOUNDATIONS OF SOCIAL POLICY

Justice studies as a contemporary field of inquiry concerns itself not only with traditional concepts of criminal justice, but also with broader economic, political, environmental, and social inequities and harms that emerge from unequal power relations, entrenched privilege, discrimination, and marginalization. Applied to public policy, a justice analysis calls attention to moral questions by identifying winners and losers and clarifying the painful costs of exclusion suffered by actual people. Though many modern-day social sciences consider distribution and social welfare important goals for public policy, policy makers do not routinely analyze their decisions critically in terms of these moral ramifications. In public goods sectors, especially, this sort of reflection is important for understanding the nuanced political and social divisions that can undermine efforts to serve society's most vulnerable members (Haglund, 2010).

In the area of water governance, the focus too often has been on the technical dimensions of provision without due consideration of other values that permeate the sector. With the rise of neoliberal reform of public goods sectors in the 1980s and 1990s, in particular, a heavy emphasis on "market-based organizing principles" such as "correct" pricing, full-cost recovery, efficiency through competition, individualistic consumerism, and investor protections predominated (Haglund, 2010).

These principles crowded out other policy options that foregrounded social, environmental, or political principles. A justice analysis brings a different set of "logics" to water governance (Syme *et al*., 1999; Syme *et al.*, 2006; Haglund 2010). For example, discourses framing water as a human right redefine marginalized groups as rights bearers rather than consumers or recipients of public largess, and emphasize state duties as a necessary corollary. This creates new channels for leveraging government action in the service of poor or otherwise marginalized groups (Nelson & Dorsey, 2003; Young, 2009; Khan, 2009), not simply for the purpose of resource distribution, but also to elevate human dignity as a legitimate legal and policy objective (Kratochvíl, 2007). Environmental rights and justice can also introduce new perspectives on the relationship between humans and the earth, strengthening environmental protection for the sake of human wellbeing. When codified into law, this perspective can raise the status of environmental protection in ways that challenge environmentally destructive forms of economic "development" endemic to capitalism (Hancock, 2003: 2).

Bringing justice questions into water governance also foregrounds new policy priorities, such as securing basic minimums, core competencies, sustainability, intergenerational justice, and fairness (Chapman, 2007; Nussbaum, 2003; Swyngedouw and Heynen, 2003; Syme *et al*., 2008; Lukasiewicz *et a*l., 2013). It also makes explicit the *social relations* that constitute and reconstitute distributive outcomes. Justice is intimately connected to class, gender, ethnicity, and other social divisions, as policies affect groups differently depending on their position in the array of power relations (Agyeman, Bullard, & Evans, 2003; Swyngedouw & Heynen, 2003). Though there is sometimes incommensurability and incompatibility in policy goals, actual decisions with material consequences are still routinely made. Current material resources and power have a strong impact on *who* makes such decisions, and the final winners and losers are partly determined by *how* different principles are brought to the table and prioritized (or ignored) (Lukes, 2003). Technocratic approaches, for example, can obscure implicit value judgments that should be made explicit and debated: "Some assumptions that give the appearance of

working very nicely and smoothly operate through concealing the choice of values and weights in cultivated opaqueness" (Sen, 1999: 110). Justice and human rights allow impediments to justice in private law and market arrangements to be scrutinized, and bring the force of law to bear on violations (Haglund & Aggarwal, 2011).

While a justice framework adds depth and moral fiber to water governance, law and justice studies can also benefit from an examination of essential goods and services such as water and other "economic and social rights." For one, the legal realm, and human rights in particular, have been criticized as individualistic to a fault (Rajagopal, 2003; Bakker, 2010). Water governance questions have the potential to move us beyond individualistic conceptions of rights to collective (or "diffuse") rights, which, when adjudicated as such, have been shown to have a greater positive impact for marginalized populations (Gauri & Brinks, 2010; see also Bond, 2013 for a discussion of how individualized adjudication can *undermine* justice in water governance). Similarly, water governance compels us to consider solutions that are more programmatic and systemic than individual remedies (Grigg, 2008; Sofoulis & Williams, 2008; Ostrom, 2009; Pahl-Wostl *et al*., 2010). The obligations invoked by public goods, in particular when framed as human rights, depend on a robust planning and policy apparatus, and may require institution- and capacity-building (Haglund, 2010). These, in turn, are more likely to bring justice to *groups* of marginalized people rather than simply to isolated claimants (Pedriana & Stryker, 2012). Planning does not automatically lead to more just outcomes, but it increases the likelihood that justice will be included in decision-making processes (Swyngedouw & Heynen, 2003).

Similarly, "justice through the lens of water" moves us beyond a consideration of mere procedure to ensure *substantive* realization. Whether courts can (or should) define the substantive core of social rights is a key area of debate for both legal scholars and actors (Klug, 2015). But for water managers, inadequate provision cannot be considered acceptable, no matter how "fair" the process. This substantive orientation also presents a direct challenge to one of the most intransigent outcomes

associated with market societies: inequality (Stryker, 2007). Addressing ecological problems and promoting equity often mean state interventions in which some people must give up material benefits, in particular where scarcity or environmental needs limit the availability of water for allocation (Syme *et al*., 2006). Water justice thus forces us to confront, directly, the political problem of how to redistribute resources in a world of dramatic inequality and a deep reverence for markets as allocative mechanisms (Haglund, 2010). As one researcher put it, "water resources management is inherently political" (Mollinga, 2008).

Resolving such conflicts requires attention to political inclusion. Though technical approaches to water did historically acknowledge voices associated with property rights, consideration of *human* rights is a more recent development. Public discussion and democratic evaluation are key inputs for determining what is of value to a particular community and for weighing policy options (Sen, 1999; Castro, 2007). Water governance thus draws our attention to the critical links between economic, social, and cultural rights on one hand, and political and civil rights on the other, as well as to so-called "third generation" rights, which stress our shared concerns for peace, sustainability, and common goods (Salman & McInerney-Lankford, 2004). The tight interdependence of these issues is evidenced in efforts to promote "integrated water resources management" (Grigg, 2008), and is reflected in the language of international water declarations. The Hague Declaration (WWC, 2000), for example, explains that water governance should reflect "its economic, social, environmental and cultural values for all its uses," and "ensure… that the involvement of the public and the interests of all stakeholders are included" (p. 1). In the language of human rights, these are factors are "indivisible" and must be considered together in order to achieve holistic, rights-responsive water governance (Syme *et al*., 2008).

In sum, just as justice considerations have the potential to alter both the thinking and practice of water governance, so the challenges of and strategies required for effective water policy could potentially compel a reconsideration of traditional legal concepts and processes of law. In the sections

that follow, I explore the mutual relationship between water governance and the legal sector in São Paulo, highlighting their emergent characteristics and tensions.

SOCIAL JUSTICE IN SÃO PAULO—THE ROLE OF LEGAL ADVOCACY

In the greater metropolitan region of São Paulo, Brazil, close to 20 million people share water resources across multiple uses, from industry to recreation to basic household use. Despite relatively high levels of annual rainfall (averaging 52 inches per year), municipal demands require nearly half of its water to be brought from distant watersheds, increasing tensions between São Paulo and its municipal neighbors. Meanwhile, resources within the city have come under increasing strain due to urban expansion, poor planning, and, more recently, climate change. Engineering such a system is, by itself, a challenge; the addition of new logics—social justice, environmental protection, and political inclusion—brought to water management by constitutional reforms in 1988 only added to the complexity (Campos & Fracalanza, 2010). Early in its history, the São Paulo state water company, SABESP, took on the mandate of constructing a network for water provision and sanitation integrally linking the metropolitan area. Yet democratization and decentralization policies did not explicitly address disjunctures between this integrated but centrally controlled system and the new structure of integrated water resources management. The new approach took the integrity of water basins, rather than previous jurisdictional boundaries, as its governing unit, entailing not only a reexamination of illegal settlements on watersheds and riversides, but also participation by a wider array of local stakeholders. Basin committees were created that crossed existing political and jurisdictional boundaries without clearly stipulating a division of labor or a means for overcoming institutional, geographic, and social fragmentation (Abers & Keck, 2006). The constitution also did not specify whether state or municipal entities were responsible for sanitation, making SABESP reluctant to invest in infrastructure for fear that municipalities might claim these systems once constructed.

Systematically incorporating new principles into larger, integrated, cross-institutional planning processes in the water and sanitation sector has thus been halting and difficult. Despite some advances (Moura & Gorsdorf, 2011), divisions persist today. Conflicts over values, uses, and institutional responsibilities are increasingly adjudicated in courts, with São Paulo's Ministério Público (MP, akin to a state prosecutor's office) acting as a key advocate. From the perspective of social justice, legal adjudication presents both promises and potential pitfalls. On one hand, legal framing of issues introduces *new logics*—such as sustainability and human rights—into policy decisions, and legal interventions can provide *new forms of leverage* in struggles to promote equity and protect the environment. Court battles lay bare the interests of various parties in public policy, and thus have the potential to provide *greater transparency* regarding winners and losers and to *shift the balance of power* away from historically dominant groups and damaging practices. Finally, legal processes can *reorient priorities of state apparatuses* to respond to a wider range of demands, and provide a space in which, "the *feasibility* of specific social and economic claims can be investigated" (Gauri & Brinks, 2010, emphasis added). On the other, top-down legal processes can run the risk of disempowering communities and individualizing problems that are, at root, about social power. Further, specific legal interventions designed to solve one problem can create new problems and conflicts when they are not well articulated with other public policy goals. In the section that follows, I outline how, in São Paulo, courts and legal actors navigate this terrain.

Bringing "justice" to water governance in São Paulo

Conflicts affecting the water sector did not originate with constitutional reforms. In Brazil, as in many other parts of the world, three potentially contradictory values are in constant tension: property rights (individual, industrial, and agricultural properties), environmental protection, and human rights. In the pre-democracy period, and to some extent thereafter, developmental elites and property holders in

São Paulo could expect their interests to be included in planning and policy processes (Hochstetler & Keck, 2007; McAllister, 2008), though the same could not be said for the environment and human rights. In the 1970s and 1980s, environmental and pro-democracy forces began to agitate for changes (Hochstetler & Keck, 2007). Coupled with high-profile cases such as industrial pollution in Cubatão and the creation of a large ecological corridor (Parque Estadual da Serra do Mar), these struggles raised awareness, "provoking people to get involved and understand and take sides."[1] Pressures from social movements, state reformers, and the broader public in turn shaped constitutional reforms, which explicitly embodied environmental norms and social rights into law. Soon thereafter, the MP and courts grew in importance as arbiters in cases of explicit environmental and human rights violations (McAllister, 2008; Haglund, 2014). In contrast to traditional political negotiations, where "those who govern can be influenced by money and other things," courts created what some saw as "a more balanced power dynamic."[2]

One entity, in particular, played an important (and in the global context, unique) role in arbitrating conflicts involving the environment: the Special Environmental Chamber (Câmara Especial do Meio Ambiente) of the São Paulo state appellate court (TJSP, 2005). The creation of this Chamber in 2005 (and subsequent creation of a second chamber in 2012) was an innovative approach to the rising number of environmental claims emerging from strong, new environmental laws. Prior to its creation, environmental cases were distributed among the large number of judges in different chambers of the appellate court, leading to a "multiplicity of opinions that could never guarantee jurisprudential consensus," as well as to sometimes worrisome delays (Nalini, 2008). The hope was that creating a single chamber—where a core group of judges with shared institutional knowledge regarding environmental litigation—could alleviate uncertainty, promote consistency, and avoid contradictions in

[1] Personal Interview with Ricardo Cintra Torres de Carvalho (Judge), Presidente, s/prejuízo, Câmara Especial do Meio Ambiente, 22 March 2012

[2] Personal Interview with Claudia Maria Beré, Promotor de Direitos Humanos (formerly of Housing and Urban Development), MP, 2 April 2012

legal judgments. It was also a "signaling mechanism" for public administrators and citizens alike that environmental issues were going to be taken seriously by the courts.

There is no doubt that in São Paulo, principles of environmental protection and social rights have gained prominence in water governance as a result of these legal and institutional shifts. SABESP managers explicitly market the company as the champion of both sustainability and rights, and indeed, the state responds quickly when people lack access to water. Judges in the Special Environmental Chamber express a range of commitments to human rights in their rulings on water and sanitation. For Judge Antonio Celso Aguilar Cortez, individual property rights are rightly questioned when they violate other constitutionally protected rights: "Our job is to make sure that constitutional promises are not empty." Judge Zelia Alves had a similarly expansive view: "I consider all aspects of protection [in my judgments about water]: rights, environment, etc.; I also consider future generations, and think about collective needs." Yet tensions between property rights, environmental rights, and social rights are not always readily reconciled, and some analysts believe that stronger environmental laws have in some cases weakened human rights.[3] Judges may attempt to sidestep controversy by looking to the letter of the law for answers, but this can lead to conflicting impulses: "Human dignity trumps other considerations; but property rights are at the same level… they are a part of human dignity."[4] There is little room in judicial processes for the community-based discussions and ongoing political engagement necessary to mediate particularistic interests and incommensurate values (Syme *et al*., 1999; Power & McCarty, 2006). But despite the fact that law is not a panacea, one reality is inescapable for judges in the Special Environmental Chamber, "everything involves human rights… There's nothing we hear that doesn't."[5]

[3] Personal Interview with Marussia Whately, Sociologist; Former coordinator "Programa Mananciais," Instituto Socioambiental, 28 March 2012
[4] Personal Interview with João Negrini Filho (Judge), Câmara Especial do Meio Ambiente, 21 March 2012
[5] Personal Interview with Zélia Maria Antunes Alves (Judge), Câmara Especial do Meio Ambiente, 30 March 2012

What that means for justice norms is that, though they have been "institutionalized" (embodied in the constitution, law, and courts), further instrumental, strategic, and discursive interventions are often necessary for them to become practices (Haglund & Aggarwal, 2011). In São Paulo, the range of instruments, both formal and informal, employed by rights-holders and advocates to hold duty-bearers to account has shifted in recent years (McAllister, 2008). Pre-litigation instruments of negotiation, pressure through publicity of violations, and emergent types of public-spirited lawsuits have enhanced the leverage and boosted the legitimacy of judges and lawyers to hold states or companies accountable (Hochstetler & Keck, 2007; Haglund, 2014). The MP and courts use their positions to raise the awareness of public administrators about their obligations regarding human rights and environmental protection. As one prosecutor explained, "Article 6 [of the Constitution] talks of social rights. This is the law. The administration needs to know this is their responsibility."[6] Legal actors also put public administrators on alert: "environmental secretaries are …taking more care to do their jobs because they know they might have issues under their purview adjudicated."[7] Lawsuits are a powerful last resort when public policies have failed. As one judge argued, "issues only come to court if they were not done properly by public administrators, so it's logical that the court [and] the MP come at this point to fill the gap between the law and compliance [with human rights to water and sanitation]."[8] Government inaction is harder to justify when justice principles are backed by human rights and environmental law, and when prosecutors and judges have legitimacy to argue that state funds are being poorly administered (Haglund, 2014).[9]

The introduction of justice principles to water governance has shifted state priorities in ways both expected and unexpected. Emerging logics of environmental protection and human rights,

[6] Personal Interview with Jose Carlos de Freitas, Promotor de Habitação e Urbanismo, MP, 4 April 2012
[7] Personal Interview with Ruy Alberto Leme Cavalheiro (Judge), Câmara Especial do Meio Ambiente, 22 March 2012
[8] Personal Interview with Alves, supra n. 5
[9] Personal Interview with Freitas, supra n. 6

defended through new laws, legal pressure, and lawsuits, spurred a shift away from simply expansion of water provision (São Paulo has had relatively high rates of coverage since the 1990s) toward construction of a sanitation infrastructure. Local teams of prosecutors and magistrates worked closely with the main water company (SABESP's) lawyers "to clarify technical and operational requirements" and design plans for compliance.[10] Legal interventions had a direct impact on SABESP's internal operations, in particular through the training of company lawyers in environmental and regulatory law and the creation of an environmental law department.

The effects of this legal intervention can also be seen in the "regularization" process in marginal communities. For many decades, sanitation was not a high priority for municipal governments (Whately & Diniz, 2009), in part because of the relatively fewer resources allocated to sanitation in comparison with water or other development projects.[11] There were also greater incentives for state actors to respond quickly to water deficiencies (people are less likely to mobilize around dimly perceived sewage issues),[12] and a hesitation to invest in projects with an uncertain property status (as mentioned above). But as the MP and courts began to put tremendous pressure on SABESP and municipalities to install sanitation infrastructure (Santoro, Ferrara, & Whately, 2009), it began "developing very rapidly."[13] Investments for regularization of favelas in the Guarapiranga watershed, for example, increased by 600% between 2001 and 2007, benefitting a reported 9,659 families (SSE, 2009).

[10] Personal Interview with Adriano C. Stringhini, SABESP, Superintendente, Superintendência de Comunicação, email correspondence with the author, 12 December 2012

[11] Personal Interview with SABESP managers and technicians: Wagner Luiz Bertoletto, Gerente de Departamento Comercial e Marketing Sul - MSM; Nercy Donini Bonato, Gerente de Departamento de Planejamento Integrado Sul - MSI; Sergio Vieira Silva, Setor Escritório Regional do Grajaú; Sidnei Ferreira Ramos, Geógrafo, Departamento de Planejamento Integrado Sul – MSI, 27 July 2009

[12] Personal Interview with Pedro Jacobi, Profesor Titular, Faculdade de Educação e Programa de Pós Graduação em Ciência Ambiental (PROCAM), University of São Paulo, 29 June 2009

[13] Personal Interview with Antonio Celso Aguilar Cortez (Judge), Câmara Especial do Meio Ambiente, 21 March 2012

TABLE 1. Investments in sanitation infrastructure: Guarapiranga watershed

Year	Total (Reais)
2001	13,746,000
2002	15,072,000
2003	15,719,000
2004	37,868,000
2005	52,916,000
2006	71,955,000
2007	84,065,000
Total	**291,341,000**

Source: Housing Secretary (Secretaria da Habitação), São Paulo Prefecture.

Though the regularization programs did not and could not solve the many intertwined problems facing urban slums in São Paulo, they indicated a marked departure from the status quo with regard to favelas in watershed areas. The legal cases, and the social justice principles upon which they were based, played a key role in the acknowledgement and attention to populations that had previously been repressed or willfully ignored by municipalities and public administrators. They provoked action where there had been decades of inaction, and created incentives for local governments and state entities to take responsibility for working together to solve water governance problems.

Justice considerations in water cases also highlight the differential effects of water policy on vulnerable versus elite populations. Rather than strictly following the letter of the law without weighing the justice implications of their rulings, judges are now being asked to consider these implications, and many of them are doing so:

there was a case in San Sebastian where a widow bought a piece of land next to the river with her insurance money. The MP asked that she be moved so the area could be restored. The ruling was that she HAD to move. But since the municipality had authorized her to build the house in the first place, they were held responsible for finding her a new place to live of comparable quality. This is a social concern. She was poor. On the other hand, I gave a ruling about 22 houses in a luxury area, also at the edge of river. Too bad for them. The municipality didn't have to pay but they had to move. It is appropriate to consider the situation of the residents.[14]

The argument here is not that poor communities have an equal chance of receiving favorable legal rulings to remedy injustices. The case of Pinheirinho—where in 2012, following a court order, a community of approximately 1,600 families was violently displaced and their homes destroyed—belies such simplistic conclusions. The logic of the law is not to question underlying forms of capitalist development. But new norms, mechanisms, and points of intervention on behalf of vulnerable populations create the potential for shining light on previously shadowy arrangements, exposing winners and losers, and providing leverage for social movements to challenge the logic of public policy. Indeed, this is what many movements have done, including the União Dos Movimentos Da Moradia, which mounted large protests in front of the São Paulo justice tribunal in the weeks following the Pinheirinho incident and filed a formal legal complaint alleging human rights violations.[15] Another example is SOS Rios, which frequently mobilizes its constituents to engage with the MP to hold public administrators accountable for environmental pollution.[16] These cases provide avenues for resistance, and provide additional resources to evaluate and judge policies based on their adherence to justice principles.

[14] Personal Interview with Cavalheiro, supra n. 7
[15] Personal observation, Tribunal de Justiça do Estado de São Paulo, March 2012.
[16] Accessed 24 October 2013: http://sosriosdobrasil.blogspot.com/2013/08/acao-civil-publica-do-mp-de-sp-obriga.html

Impact of water governance demands on the legal field in São Paulo

Not only are legal struggles over resources shaping state orientations and behaviors in São Paulo, but also, and conversely, demands of water and sanitation governance are shaping the meaning of, and approaches to, constitutionally secured rights and protections. New legal norms and mechanisms used to promote visions of social justice confront a long-standing legal tradition that relies heavily on theoretical principles and doctrinaire reasoning. The civil law tradition as it is practiced in Brazil leads to an abstract, systematized way of thinking that "does not really teach students how to solve administrative problems."[17] A review of completed theses from the University of São Paulo Faculty of Law (the oldest and most highly revered law school in the country) confirms this, revealing a formalized training that tends to eschew empirical issues. Each branch of law is considered a separate, autonomous science, so when there is overlap (for example, in complex water and sanitation cases involving both environmental law and human rights), it may lead to disarticulation and disharmony among actors in practice. In the MP, it can be

> *difficult for lawyers to keep the whole picture in mind. Legal training does not teach problem solving through law. Law itself is the end. Students do not get training in looking at complex social problems or understanding problems empirically*.[18]

Judges are trained in broad categories of "public" or "private" law, but the idea of specialization in a substantive area such as water is only nascent.[19] Large municipalities might have judges who specialize in public law with an emphasis on the environment, but this is voluntary:

> *Generally it is judges who have an interest in the environment that move in this direction, but sometimes it is just if there is an opening on the bench, and then they learn as they go. There is no specialized training beyond law itself unless the judge seeks it*.[20]

[17] Personal Interview with Diogo Coutinho, Associate Professor, University of Sao Paulo Law Faculty, 9 March 2012
[18] Personal Interview with Luis Roberto Proença, Promotor de Justiça do Meio Ambiente, MP, 14 March 2012
[19] Personal Interview with Freitas, supra n. 6

Because of this training and the relatively conservative nature of the Brazilian courts vis-à-vis social rights claims (Gauri & Brinks, 2010), there is resistance to becoming involved in policy questions. Though much of the state went through a transformation toward a more liberal engagement with social justice with the rise to power of the Workers' Party (PT), this shift has yet to permeate the judiciary. As one judge told me regarding illegal settlement on watersheds:

> *The problem of housing is not a problem of judges. It is a problem of public administration. I do my part as a judge, and administrators do their part. If settlers move to another protected area, we deal with that when it happens. Some judges try to fix a problem by saying "move, but only when [the people find housing]." This fixes and doesn't fix the problem.* ***I prefer to fix the problem I have control over, and let the administration deal with their problems***.[21]

This attitude contrasts with the more activist role courts have played in questions of water governance in places like South Africa and India. According to some environmental experts, attempts to find solutions to complex water and sanitation problems by turning to the law, rather than analyzing the empirical situation, is insufficient: "I am skeptical of the ability of courts to improve the situation because… their vision is not broad enough, and they are not thinking like environmental specialists."[22]

Interestingly, however, it is precisely problems of watershed protection and sanitation infrastructure in São Paulo that are forcing lawyers and judges to move beyond legal abstraction to more grounded decision-making. The uneasy truce between property rights, environmental protection, and social justice is not well mediated by abstract law, and judges and advocates are thus faced with re-evaluating the nature of law and their own role in ensuring justice and protecting resources. As the aforementioned judge who eschews administrative problems acknowledged, the law may dictate that people leave a watershed, but "there are definitely cases, for example when land use is consolidated

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[20] Personal Interview with Cortez, supra n. 13
[21] Personal Interview with Carvalho, supra n. 1 (emphasis added)
[22] Personal Interview with Maria Luiza Granziera, Professor of Environmental Law, Universidade Católica de Santos (UNISANTOS), 27 March 2012

and in some ways serves the public interest, where the law cannot be applied; I don't rule to change that situation."[23] There had been a historical tendency for higher courts to forbid judicial intervention in policy questions with budget implications, as most water and sanitation cases do.[24] But more recently, a regional appeals court ruled that municipalities can be prosecuted for failing to provide sanitation (TRF4, 2011).

Another area where legal tradition tends to clash with more recent social justice demands is in the individualized nature of much litigation. Individualized litigation in the water sector can lead to negative outcomes for communities (Bond, 2013; Bakker, 2010). Though Brazilian courts still retain a preference for individualized adjudication (Hoffman & Bentes, 2010), the Brazilian Constitution of 1988 (Article 129-III) explicitly gave the MP powers to "promote civil investigations and public civil actions for the protection of public and social patrimony, of the environment and of other diffuse and collective interests." Water and sanitation provision are quintessentially "collective" in that identifiable groups of people (all) have an interest in having access, as well as "diffuse" in that good water governance affects society as a whole (see McAllister, 2008: 199). Collective cases have become more numerous in recent years, which has meant that judges in São Paulo increasingly must confront potential contradictions between defending individual rights in the present and protecting collective or diffuse interests in the present and future:

> *Providing sanitation now is part of our legal obligations… Protecting the environment for future generations is also in the law, and is considered fundamental. Sometimes these broader, societal and future generation rights trump individual rights*.[25]

In fact, the newly created Special Environmental Chamber sees very few individual cases, and most of those concern individuals who are fighting penalties they have received for environmental violations.

[23] Personal Interview with Carvalho, supra n. 1
[24] Personal Interview with Ronaldo Porto Macedo Júnior, Procurador de Justiça, MP, 13 March 2012
[25] Personal Interview with Negrini, supra n. 4

The chamber was created specifically to handle cases with wider societal impact, and it tends to attract judges who are open to collective cases, [26] creating an iteratively more receptive approach to systemic change.[27]

Prosecutors, as well, have had to modify single-minded pursuit of individual remedies in water and sanitation cases in order to address multifaceted challenges:

> *Balance is hard to find because sometimes when you honor one right, you put another at risk. There is not always money in the public purse to move people to housing. Environmental problems are not always remedied… We seek to have a balance*.[28]

The complexity of these cases has provided opportunities for novel legal approaches to problem solving. In the case of Cocaia, a favela alongside Billings Reservoir that had no sanitation system, the residents purchased their land from someone who did not own it, and built their houses there. The real owner won a lawsuit establishing his property rights, and began a suit against the water company, SABESP, for installing sanitation on his land. SABESP and municipal lawyers met and agreed to tell the property owner that either he could let them build the infrastructure, or they would take him to court for environmental violations. The state actors prevailed. As one water expert close to the case recounted, "If it had only been about human rights, they wouldn't have had this leverage."[29]

Case-by-case litigation similarly can create obstacles to addressing complex challenges. Though at first glance, cases seem better tailored to empirical realities, they also tend to miss the big picture in thorny governance issues. Public prosecution in São Paulo tends to be individualistic, with no clear hierarchy and few mechanisms for coordination among prosecutors (Proença, 2006; Haglund, 2014). In

[26] Personal Interview with Cortez, supra n. 13
[27] Personal Interview with Carvalho, supra n. 1
[28] Personal Interview with Freitas, supra n. 6
[29] Personal Interview with Ricardo Araújo, Former Coordinator, Programa Mananciais, Secretaria de Saneamento e Energia do Estado de São Paulo (SSE, now SSRH), 3 April 2012

this situation, individual cases potentially become disconnected from broader MP or societal goals. The way cases are admitted and processed can exacerbate this piecemeal approach:

> *Prosecutors wait for cases to come to their desk, and then handle them one by one. It's hard to have a broader strategy because they feel obliged to take on every case… It becomes very bureaucratic rather than programmatic… There are a few instances where the big picture comes in, like the MP enforcing the rule that the state has to have a planning document for the environment every year. But it is more common to have individual cases that are not really linked to the whole picture*.[30]

As cases move through appeals at the state or federal level, different prosecutors are brought in than the one who originally researched and defended it, creating fragmentation in the case narrative. These lawyers "might even take the opposite position from the original prosecutor," and may "have no contact with the original prosecutor."[31] Appeals are thus fought by people who may have little knowledge of, and sometimes no interest in, the original case.

Fragmentation in the MP and in courts has left little room for coordination and dialogue between the judiciary and other branches of government, an important ingredient for improving public policy (Verissimo, 2006). But there are signs that the demands of the water sectors may be forcing a more programmatic approach. In some smaller municipalities, there are specialized prosecutors whose jurisdictions follow ecological rather than administrative boundaries, and who have the authority to file legal suits across such boundaries.[32] This model may encounter difficulties functioning in an area as large as São Paulo, but it offers a glimpse of some of the creative solutions being put forward to address the realities of water governance. As the number of "collective" cases and the resulting tension between legal and administrative interventions grow, so does the need for systematic, coordinated remedies that

[30] Personal Interview with Proença, supra n. 18
[31] Personal Interview with Proença, supra n. 18
[32] Personal Interview with Macedo, supra n. 24

serve the collectivity. Despite the frustration or resignation that many judges expressed regarding administrative issues beyond their control, they nevertheless did not turn away from their legal duties: "We are trying to help improve the system as a whole… These issues need to be adjudicated."[33] Most of the judges interviewed pointed to concrete changes that have resulted from the formidable demands of water governance, including increased specialization in environment and human rights as part of legal training, a growing literature regarding social rights, and faster judgments and quicker resolution of environmental problems due to the accumulation of precedent.

Though there was no real tradition of working together among legal and non-legal organs of the state until very recently, due to the urgent demands of watershed management, there have been improvements.[34] Programa Mananciais (SSE, 2009) (the Watershed Project), for example, evidenced an unusual degree of institutional articulation in "regularizing" favelas. The plan was complex—involving the municipality, the MP, the state, and the federal government—and its environmental component entailed moving settlers from certain preservation and risk areas, as well as building sanitation and other infrastructure to protect the remaining resources.[35] Though the case-based approach of the MP was criticized by some for requiring intervention only in select areas to the possible exclusion of others or the big picture,[36] in the context of the plan as a whole, the MP served an important accountability function. And importantly, as these projects are designed and implemented, "the tradition of success builds on itself, builds capacity."[37]

Capacity is a crucial point of necessity as policy is increasingly "legalized" (Gauri & Brinks, 2010). Whether judges are qualified to evaluate the needs of the water sector when their expertise is in law is a point of stringent debate. Judges in the Environmental Chamber are aware of the need to consult with

[33] Personal Interview with Cavalheiro, supra n. 7
[34] Personal Interview with Araújo, supra n. 29
[35] Personal Interview with José Eduardo Ismael Lutti, Promotor de Justiça do Meio Ambiente, MP, 14 March 2012
[36] Personal Interview with Paula Freire Santoro, architect; former researcher with Instituto Pólis, 5 April 2012
[37] Personal Interview with Araújo, supra n. 29

experts to help them evaluate the substantive, technological dimensions of a case, and they often do so. "Peritos" or "specialists" (doctors, engineers, lawyers, etc.) who assist on cases are often public (e.g., university) employees, in which case they are obligated to make evaluations, often without payment.[38] They might also be private actors, in which case the judge or other person asking for support must provide compensation, either by asking the defendant or the MP to pay.[39] Some judges even take on investigative responsibilities themselves:

> *I had a case in the interior regarding water - a conflict between neighbors. They didn't have an engineer to investigate, so it came to me. I went out there, saw the place, asked some friends about it, went to the library, and got to the bottom of it. Judges have this responsibility*. [40]

Though most judges interviewed believed they had sufficient technical support to make informed decisions, many respondents had mixed feelings about this system, in particular due to the fragmented, individualized approach it fosters, the uneven guidance it provides judges depending on their connections, and the burdens it potentially places on public professionals. There is an additional risk of biased assessments:

> *Sometimes the private specialists have their own interests, as they work for the businesses in the area or have connections with people who degrade the environment. The specialists might depend for their income on agriculturalists or business people. Judges and courts don't have their own technical evaluation teams, and they should*. [41]

The reality of judges making difficult decisions about water and environmental governance under less than ideal circumstances has led to calls for a more formal system of coordinated, funded, and substantive evaluations and support.

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[38] Personal Interview with Cristina Godoy, Promotora de Meio Ambiente, CAOs, MP. 4 April 2012
[39] Personal Interview with Alves, supra n. 5
[40] Personal Interview with Cavalheiro, supra n. 7
[41] Personal Interview with Nelson Bugalho, Director Vice-President, CETESB; former Promotor de Justiça, MP, 10 April 2012

The MP is somewhat better positioned in terms of technical support, in that they have internal investigation teams consisting of engineers, biologists, and others called CAEX (Technical and Enforcement Support Centers), as well as the similarly named CAOs (Operational Support Centers), which offer mainly legal and judicial support for prosecutors.[42] Theoretically, CAOs could help with coordination *among* prosecutors and reduce conflict within the MP, but they have not performed this role, in part because "it has been difficult to convince prosecutors to work in concert." [43] Some prosecutors have, however, taken it upon themselves "to translate complex [water and sanitation] cases for judges, who have the legal competence, but not necessarily the technical know-how.[44] Again, according to some interviewees, water governance demands that these kinds of Operational Support Centers be developed across problem areas, and that they incorporate both legal and non-legal actors in information sharing, problem evaluation, and intervention.

Although there is widespread agreement that better mechanisms of coordination would be helpful, and in isolated instances they are being considered and developed, such mechanisms are still in short supply. One of the barriers to their creation, besides institutional fragmentation, is cost: "Sometimes there is a shortage of specialists to evaluate a complex case. There should be a fund to pay for this. Some judges ask the defendant to pay, but others don't."[45] The cost of *addressing* problems, as well, often is not part of legal discourse. As mentioned above, it was previously forbidden for judges to weigh in on budget allocation, and prosecutors steered clear as well:

> *The role of prosecutors isn't to consider the costs of fixing a problem. That's not their job. They just make the arguments of what is wrong and how it is violating the law. Cost comes into the*

[42] Personal Interview with Lutti, supra n. 35
[43] Personal Interview with Macedo, supra n. 24
[44] Personal Interview with Carlos Salles, Procurador de Justiça, MP. Professor, USP Direito, 28 March 2012
[45] Personal Interview with Beré, supra n. 2

picture when they point out the cost to the government of sickness, or of having to retrieve water from further away, or whatever.[46]

But ignoring costs considerations does not make them go away. As with capacity-building, complex water challenges highlight the need for methods of incorporating cost considerations into legal interventions. Recently, higher courts have recognized that even questions of budget allocation can be adjudicated (TRF4, 2011). Judges do at times allow the issues of cost to enter their judgments, if only because they prefer not to make a "doomed" ruling (Gauri & Brinks, 2010):

Judges do try to account for cases when the state cannot afford the steps required to remedy a problem (as in small municipalities). If there is a case where the problem has gone on for 20 years and nothing has been done to remedy [it], however, we start losing confidence in this argument… On the other hand, if something is simply impossible, the courts are not going to rule in favor of it.[47]

One other way in which the challenges of water governance redirect the gaze of legal actors is with substantive effects. As mentioned above, Brazilian legal actors are trained to approach their work with a theoretical orientation, rather than focusing on empirical outcomes (intended or unintended).[48] But whether or not desired outcomes are achieved is an urgent question in the water sector because of the serious consequences of mismanagement for human wellbeing and the environment: "[Legal] delays are the real problem; sometimes the environment cannot wait."[49] In response to this reality, some prosecutors look for creative ways to avoid litigation, including working directly with administrative agencies, indirectly threatening litigation, or otherwise compelling pre-litigation legal compliance.[50]

[46] Personal Interview with Lutti, supra n. 35
[47] Personal Interview with Negrini, supra n. 4
[48] Personal Interview with Marcos Veríssimo, Assisstant Professor, University of Sao Paulo Law Faculty, 9 March 2012
[49] Personal Interview with Cortez, supra n. 13
[50] Personal Interview with Macedo, supra n. 24

There is one area of water governance that was strongly emphasized with Brazilian constitutional reforms that has not been well incorporated into the legal field in São Paulo: the importance of democratic participation. Conceptions of water governance that incorporate justice principles must interrogate *who* makes decisions based on *what criteria*, *by what means* and *to what ends*, as well as how "common citizens participate in the determination of those ends and values, and in the identification of the means for pursuing them" (Castro, 2007). In the legal cases discussed here, it is largely lawyers and courts that argue the value of different routes of action. This may be partly by choice (Haglund, 2014):

> *There has been very little NGO inclusion in MP cases. They ask the MP or other public defenders to do it instead. They would have to have money and hire a lawyer. These are poor peoples' organizations, and thus are poor themselves. They also believe judges are more receptive to the MP or Public Defender, though I don't necessarily believe this*.[51]

Some aspects of justice are well served by the fact that the MP, with its greater resources, is required to investigate all cases brought to its attention. But other concerns such as "voice," representation of all views and values, and sufficient and clear communication among all stakeholders are more elusive. Decision-making that gives priority to experts with little public consultation may result in policies that come across as a *fait accompli*, causing misunderstandings, resentments, and conflicts that last for years (Nancarrow & Syme, 2001).

There are other venues for citizen participation in water governance in São Paulo, such as water basin committees. But the key point here is that the full range of "human rights" that a justice approach to water governance would consider "indivisible" are *not* currently incorporated in a holistic fashion in judicial processes. This is a tension—at least for water governance—as demands for political, civil, economic, social, and cultural rights in their entirety are an integral part of holistic water management.

[51] Personal Interview with Beré, supra n. 2

CONCLUSION: THE MUTUAL CONSTITUTION OF WATER GOVERNANCE AND JUSTICE

The analysis presented in this paper is preliminary, in that not all potentially relevant documents could be obtained and examined, nor every relevant actor interviewed. Some initial observations can be made, however, regarding the mutually constitutive nature of water policy and the legal field in São Paulo. Democratization brought new legal mechanisms to protect and promote the rights and aspirations of Brazilians, and prioritized new logics for public administration—social justice, environmental protection, and political inclusion. Challenges and barriers to realizing these aspirations, including the complexity and the magnitude of the social problems themselves, facilitated a turn to courts to resolve discrepancies between norms and on-the-ground realities. Courts and law have provided new forms of leverage to promote transparency, to question historical domination and destructive development practices, and to force public administrators to justify their priorities. While law is not a panacea—it is not designed as a planning device, and legal empowerment of poor communities is limited—legal norms open up a range of strategies, both formal and informal, for promoting accountability, raising awareness, and fostering responsive government.

Water governance in São Paulo is unquestionably influenced by the multiple (and sometimes conflicting) norms of human rights and environmental protection embodied in law and the constitution. Legal interventions on behalf of these norms (or the threat thereof) have led to vigorous discussions among institutional actors in the water company, the regulatory agency, the MP, and the private sector about policy priorities and alternative strategies for complying with legal obligations. Court judgments have helped to clarify expectations, and set clear limits regarding when and how compliance must occur. The rapid development of sanitation infrastructure and "regularization" of marginal communities are two examples of policy arenas where law has played a key role. Court cases have also called attention to differential effects of water policy decisions on poor communities versus wealthy developers, thus

providing new points of leverage for social movements seeking to challenge existing power relations and distribution of resources. The legal field thus has the *potential* to act as an "anti-systemic force… tasked with prioritizing social and environmental values over the interests of capital accumulation" (Hancock, 2003: 7). However, the results also indicate that despite these emerging dynamics, legal strategies do not *necessarily* address structural and political barriers to justice, or overcome entrenched interests or contradictions among policy goals. A more systematic coordination among policy objectives and more vigorous inclusion of alternative voices would be needed to overcome barriers to a "just sustainability" (Agyeman, Bullard, & Evans, 2003). Future research on these dynamics would undoubtedly be beneficial for communities, human rights, and environmental advocacy.

Meanwhile, as water and sanitation issues are increasingly adjudicated in courts, legal actors are forced to reconsider historical conceptions, assumptions, and behaviors, opening the possibility for a more robust engagement with collective and diffuse rights, programmatic solutions, substantive outcomes, and the full range of human rights. The inherent "collective" and "diffuse" nature of water and sanitation rights has allowed lawyers to put forward novel arguments for preventing harm to broader constituencies (even those not yet born), and judges to consider these impacts. The systemic breakdown of certain aspects of water governance, in particular watershed protection and sanitation infrastructure, have led legal actors to pinpoint failings of specific public administrators and institutions, thus creating targeted pressure for concrete, programmatic shifts, as well as for institution- and capacity-building to remedy shortcomings. There is still room for improved coordination across cases and institutions, and within geographic contexts, as well as improved turnaround time and more effective participatory governance mechanisms. But emerging developments—in particular, the creation of two Special Environmental Chambers and calls for improved legal education and support in relation to complex environmental policy issues—are promising.

The use of law to adjudicate tricky social problems has also had the effect of broadening the vision of judges and lawyers beyond their formal training and expanding the meaning of "justice." Though some judges contended that they were simply upholding the law, several others saw themselves as protecting the interests of society as a whole:

> Interviewer: *Do you see yourself as a protector of social rights?*
>
> Interviewee: *Yes, as well as a protector of cities and the environment, and someone who protects the public against global warming and other environmental problems*.[52]

This statement is not mere hyperbole, in the sense that judges in the Special Environmental Chamber *are* being asked to lead the way into uncharted territory with few resources or legal precedent. The expectations are high: "It is historic; the judges are providing a great service to São Paulo and to the country."[53] Of course, these shifts in the role, perception, and action of the judiciary are not guaranteed, but rather, are contingent, newly emerging resolutions of tensions between traditional justice principles and the demands of integrated, holistic, and responsive water governance. Formal institutional and legal mechanisms do not operate alone, but work iteratively with social struggle to influence the degree to which water governance is premised on ideas of social justice.

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[52] Personal Interview with Alves, supra n. 5
[53] Statements made by Daniel Fink, Prosecutor, MP, before the first Environmental Chamber, 29 March 2012

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